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SUPREME COURT OF THE UNITED STATES

October Term, 1958.

No. 708

EDWARD A. KRAFT,
V. E. BARNES,
LUKE MUNZER, Individually, and
EDWARD A. KRAFT, V. E. BARNES, and LUKE MUNZER, Constituting the Remonstrating Committee of Residents and Freeholders Opposing Annexation to the City of Louisville, - - - - - - - - Petitioners,

versus

CITY OF LOUISVILLE, - - - - - Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS.

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February, 1959.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

INDEX.

	PAGE
Citations to Opinions Below	2
Jurisdiction	2
Question Presented	3
Statutes Involved	3
Statement	3
Federal Question Raised	9
Reasons for Granting the Writ	11
Conclusion	18
Appendix	19

CITATIONS.

Cases:	PAGE
Kraft, et al. v. City of Louisville, 297 S. W. 2d 39	2
City of Louisville v. Kraft, et al., 317 S. W. 2d 161	2
Brinkerhoff-Faris Trust Co. v. Hill, 281 U. S. 673, 677-678, 74 L. Ed. 1107, 1111-1112, 50 S. Ct. 451	11
Great Northern Railways Co. v. Sunburst Oil & Refining Co., 287 U. S. 358, 77 L. Ed. 360	12
World Fire & Marine Insurance Co. v. Tapp, 151 S. W. 2d 428	13
Jett v. Holland, 124 S. W. 2d 1055	13
Overstreet v. City of Louisville, 310 Ky. 1, 219 S. W. 2d 405 (1949)	13
Engle v. City of Louisville, 312 Ky. 383, 227 S. W. 2d 407 (1950)	13

PAGE

Whitesides, et al. v. Reed, et al., 306 S. W. 2d 249 (1957) 15

Virginia-Carolina Tie & Wood Co., Inc. v. Dunbar, 4 Cir. 106 F. 2d 383, 385 15

Commonwealth v. Ragland Potter Co., 305 S. W. 2d 917 16

Coyle v. Capital Engineering Services, 314 S. W. 2d 541 (1958) 16

Maslow Cooperage Corp. v. Hofgesang, 316 S. W. 2d 126 (1958) 17

National Association for the Advancement of Colored People v. State of Alabama, 357 U. S. 2 L. Ed. 2d 1488, 78 S. Ct. 1163 17

Statutes:

Kentucky Revised Statutes 81.100 3

Kentucky Revised Statutes 81.110 ..... 3, 4, 6, 11

Kentucky Revised Statutes 81.270 ..... 3, 13

Kentucky Revised Statutes 81.300 ..... 3, 7

Kentucky Revised Statutes 81.310 ..... 3, 7, 14

Kentucky Revised Statutes 81.320 ..... 3, 7, 14

Kentucky Revised Statutes 81.330 ..... 3, 7, 14

Kentucky Revised Statutes 21.070 ..... 3, 16

Kentucky Civil Rules of Procedure Sec. 16 ..... 3, 12, 16

Kentucky Civil Rules of Procedure Sec. 50.01 ..... 3, 14, 16

Kentucky Civil Rules of Procedure 50.02 ..... 3, 15, 16

Kentucky Civil Rules of Procedure 50.03 ..... 3, 15, 16

Kentucky Civil Rules of Procedure 51 ..... 2, 14

Kentucky Civil Rules of Procedure 59.01, Sec. (1), (3), (7), (8) 3

Kentucky Civil Rules of Procedure 60.02, Sec. (4), (6) 3

Rules of Court of Appeals, 1.340 11

INDEX TO APPENDIX.

	PAGE
Appendix "A"—Opinion of the Court by Commissioner Cullen—Reversing	19
Appendix "B"—Appellees' Petition for Rehearing	29
Appendix "C"—Opinion of the Court by Commissioner Waddill—Affirming	34
Appendix "D"—Appellants' Petition for Rehearing	37
Appellees' Brief on Motion to Recall Mandate—Issued January, 1957	35
Appendix "E"—Kentucky Revised Statutes	62
Appendix "F"—Map of the City of St. Matthews	73

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No. _____

EDWARD A. KRAFT,
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EDWARD A. KRAFT, V. E. BARNES, and LUKE MUNZER, Constituting the Remonstrating Committee of Residents and Freeholders Opposing Annexation to the City of Louisville, - - - - - *Petitioners*,

v.

CITY OF LOUISVILLE, - - - - - *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS.

Petitioners pray that a writ of certiorari issue to review two judgments of the Kentucky Court of Appeals entered (1) October 19, 1956, rehearing denied January 25, 1957 (Appendix "A", page 19); (2) July 11, 1958, rehearing denied November 21, 1958 (Appendix "A", page 34).

CITATIONS TO OPINIONS BELOW.

The opinion of the Trial Court is set forth, *infra*, page 6 (R. (1), 118).[1] The opinion of the Kentucky Court of Appeals on the first appeal printed in Appendix "A", *infra*, page 19, is reported in 297 S. W. 2d 39. The opinion of the Kentucky Court of Appeals on the second appeal is printed in Appendix "A", *infra*, page 34, is reported in 317 S. W. 2d 161.

JURISDICTION.

The judgment of the Kentucky Court of Appeals was entered on July 11, 1958 (R. (2), 74). A timely petition for rehearing filed on August 11, 1958 (R. (2), 78) was denied on November 21, 1958 (R. (2), 135) without opinion. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257 (3), since the validity of State Statutes and State Rules of Civil Procedure is drawn in question on the ground of their being repugnant to the Constitution of the United States.

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[1]Abbreviations used:

K.R.S.—Kentucky Revised Statutes
C.R.—Kentucky Rules of Civil Procedure
R.C.A.—Rules of Kentucky Court of Appeals
App.—Appendix
R. (1)—Record below on first appeal (76878)
R. (2)—Record below on second appeal (77841)

QUESTION PRESENTED.

The question presented is whether the highest Court of the State of Kentucky may place constructions upon otherwise valid state statutes and civil rules of procedure at variance with constructions formerly and contemporaneously adopted by the same Court, thereby depriving petitioners of existing remedies for the enforcement of certain rights which the State has no power to destroy, without affording petitioners any opportunity to protect those rights.

STATUTES INVOLVED.

The statutory provisions involved are Kentucky Revised Statutes: 81.100; 81.110; 81.270; 81.300; 81.310; 81.320; 81.330; 21.070; Kentucky Civil Rules, Sections 16; 50.01; 50.02; 50.03; 51; 59.01 (1), (3), (7), (8); 60.02 (4), (6). They are printed as Appendix "E", *infra,* pages 62-72.

STATEMENT.

A petition of remonstrance against annexation was filed against the City of Louisville on May 22, 1946 (R. (1), 7). The jurisdiction of the Jefferson Circuit Court was invoked under Kentucky Revised Statutes 81.110.

Plaintiff filed two supplemental amended petitions, and tendered a third, to which defendant objected and was sustained. The action was tried on the allegations of the petition and the first paragraph of the first

amended petition; the remaining allegations of the first and second amended petitions were stricken, or a demurrer sustained thereto.

The petition and answer presented an issue as to which party had the burden of proof, and, the form of instructions to be given to the jury. If less than 75% of the resident freeholders had remonstrated at time of trial, the plaintiffs had the burden of proof on the issue of whether annexation will be for the interest of the City, and will cause no manifest injury to the persons owning real estate in the territory to be annexed. If 75% or more had remonstrated, the burden of proof was on the defendant to overcome the statutory provision that the annexation shall not take place unless the jury finds from the evidence that a failure to annex will materially retard the prosperity of the city and of the owners and inhabitants of the territory sought to be annexed (Kentucky Revised Statutes 81.110, Appendix "E", page 62). The statute places the duty on the jury to decide whether 75%, or more, of the residents had remonstrated.

Six pre-trial conferences were held in attempts to reach agreement on whether more or less than 75% resident freeholders had remonstrated, or whether there would be a trial if the issue were to be submitted to the jury whether 75% of the resident freeholders had remonstrated which would have taken more than a week of the Court's time. At the sixth conference, on December 14, 1954, the parties agreed to a trial stipulation which the Court approved (R. (1), 96). The stipulation was:

"By agreement between the attorney for the plaintiffs and the attorney for the defendant in the above styled action it is hereby stipulated as follows:

I.

"The attorney for the plaintiffs, Wilbur Fields, represents a substantial number of the freeholders in the area proposed to be annexed to the City of Louisville by Ordinance 51, Series 1946.

II.

"It is stipulated that the plaintiffs, on the trial of this case, shall have the burden of proof on the whole case and that the Court shall instruct the jury with the appropriate instructions as provided by KRS 81.110 (2) when less than 75% of the freeholders of the territory to be annexed have remonstrated. Instructions to be given by the Court shall be as follows:"

There followed Instructions 1 to 4 inclusive (R. (1), 97). On February 28, 1955 (R. (1), 100) the Court ordered the Clerk on plaintiffs' motion to make part of the record for the purpose of appeal all pleadings to the filing of which defendant's objections were sustained.

The action was tried by a jury on February 28, March 1, 2 and 3, 1955 (R. (1), 101-103). The stipulated instructions were given by the Court (R. (1), 104-105). A verdict for plaintiffs was returned on March 3, 1955 (R. (1), 103). Judgment for plaintiffs was entered pursuant to the verdict March 7, 1955 (R. (1), 105).

On March 11, 1955 the defendant filed a motion for judgment notwithstanding the verdict and motion for a new trial (R. (1), 114-115). The Court entered an opinion on the motion April 8, 1955 (R. (1), 118) and overruled defendant's motions on April 11, 1955 (R. (1), 119). The opinion reads:

> "This cause is submitted on the motions of the defendant, City of Louisville, for a new trial and for a judgment notwithstanding the verdict of the jury.
>
> "Kentucky Revised Statute Sec. 81.110 directs that the protest of residents or freeholders against annexation of unincorporated territory or the reduction of territory by a City of the First Class shall be heard by a jury according to the prescribed practice.
>
> "Under the evidence adduced and as the case was practiced, the Court is of the opinion that it would have been error to have sustained the defendant City's motion for a directed verdict.
>
> "The instructions given by the Court to the Jury are not questioned, indeed they were agreed upon by counsel for the contesting parties.
>
> "The Jury's verdict was against annexation.
>
> "Motion overruled.
>
> "Counsel will draw order."

The defendant filed an appeal to the Kentucky Court of Appeals, the highest court of the state. On October 19, 1956 the Kentucky Court of Appeals reversed the judgment, and remanded with instructions to enter judgment for Louisville, notwithstanding the jury verdict for plaintiffs. The opinion is printed

as Appendix "A", *infra,* page 19. The opinion did not refer to the trial stipulation. On November 6, 1956, at a general election the question of annexing the same and other territory was submitted pursuant to Kentucky Revised Statutes 81.300 to 81.330 (Appendix "E", pages 63-64) to the voters and rejected by the voters (Supp. R. 3). A petition for rehearing was filed in the Court of Appeals from the judgment of October 19, 1956. The petition is printed as Appendix "B", *infra,* page 29. On January 25, 1957 the Court overruled the petition for rehearing without opinion. The mandate was filed in the Jefferson Circuit Court (R. (2), 7).

The plaintiffs tendered in the trial court on January 26, 1957 a special supplemental complaint (R. (2), 7) and a motion to file the supplemental complaint, and set aside orders striking certain plaintiffs' pleadings, and to file a substituted amended complaint. The special complaint plead the adverse vote on November 6, 1956 as a statutory bar to the Court's continued jurisdiction and to Louisville taking any further steps to annex the territory for five years from November 6, 1956 (R. (2), 7).

The substituted amended complaint plead certain grounds for remonstrance that were not tried by the trial court, nor considered on appeal (R. (2), 11-19). Judgment pursuant to the mandate was entered March 8, 1957 (R. (2), 44).

On March 8, 1957 plaintiffs filed a motion and grounds for a new trial (R. (2), 50). The motion specified errors of the trial court in striking plain-

tiffs' pleadings before the trial, the adverse vote of November 6, 1956 voiding all proceedings to annex, and failure of Louisville to publish its ordinance proposing annexation, which had the statutory effect of making the ordinance inoperative.

Plaintiffs' motion to set aside orders striking plaintiffs' pleadings, and to file plaintiffs' substituted and special complaints was overruled March 8, 1957 (R. (2), 52) and plaintiffs' motion for a new trial was overruled the same date (R. (2), 53). The pleadings set forth in plaintiffs' motion were made part of the record for purposes of appeal (R. (2), 54).

Plaintiffs filed a motion to recall the mandate issued January 25, 1957, which was overruled October 3, 1958 (R. (1), 811). An appeal to the Kentucky Court of Appeals from the judgment of March 8, 1957 was affirmed by the Court of Appeals on July 11, 1958. The opinion is printed as Appendix "C", *infra*, page 34. A petition for rehearing was timely filed and overruled without opinion on November 21, 1958.

The judgment of the Court of Appeals entered November 21, 1958 is the final order from the highest court of Kentucky, giving this Court jurisdiction.

FEDERAL QUESTION RAISED.

Plaintiffs below, first raised the federal question by their petition for rehearing filed on the second appeal, August 11, 1958 (R. (2), 78-104), which was overruled without opinion on November 21, 1958 (R. (2) 135). The first paragraph of the petition for rehearing states (R. (2) 82):

> "This petition is filed to present:
>
> "(1) a federal question under the Fourteenth Amendment of the United States Constitution * * *."

The petition then specified each of the grounds on which they had been denied equal protection of the laws, petitioners also stated that:

> "If appellees are denied the verdict of the jury authorized by statute, and by the pre-trial agreed order, then they submit to the Court, their grievance that they have been denied equal protection of the laws guaranteed them by the Fourteenth Amendment of the United States Constitution."[1]

The petition submitted that the Court had denied equal protection of the two sections of Civil Rule (C.R.) 50.03 (Appendix, page 69) that the mandate reversing on the first appeal was issued pursuant to the first section of that rule and the right to move for a new trial granted by the second section of the rule was

[1]This statement was made in brief filed by petitioners in support of motion to recall the mandate issued January 25, 1957 (R. (2) 98 and R. (1) 811) on the first appeal. The brief was attached to and made part of the petition for rehearing filed August 11, 1958 (R. (2) 78).

denied on the second appeal; that by so ruling the Court had denied appellants an opportunity to be heard on valid grounds for remonstrating, and statutory bars to annexation, each timely presented; that the Court in denying the right to be heard on said issues interpreted certain statute laws contrary to its prior decisions denying any opportunity to petitioners to protect their rights under the surprise reversal of law by the Court; the Court stated in its opinion on the second appeal (R. (2) 74-75) that upon issuance of its mandate:

> "The Remonstrants could challenge only the failure of the trial court to enter judgment in conformity with the opinion and mandate of this Court." (R (2) 75),

which statement was contrary to the statutes, negatively contrary to the Court's prior rulings interpreting the statutes, and denied remonstrants any explanation or reason for refusing them the protection of, or, due process of law.

The federal questions involved are of national importance. The States, and the large cities, are working on the problem of municipal services and laws for metropolitan areas. The question involves the necessity of new laws and constitutional amendments. The Kentucky Court of Appeals has chosen the course of changing the laws by interpretation according to its judicial concept of the ultimate factors involved, that in so doing the Court has usurped the power which the Court admits belongs to the legislative branch.

The Court stated in its opinion on the first appeal (Appendix, page 22):

> "Of the first consideration is the fact that the creation of municipalities and the increase or reduction of their boundaries, are matters of legislative function."

The opinion then misquotes Kentucky Revised Statutes (KRS) 81.110 (Appendix, page 62) by reciting that the statute prescribes facts to be determined by "court and jury", whereas the statute provides for determination by jury. The Court then interpolated additional changes in the statute law, the ultimate effect of which was to vest itself with the legislative function in such matters.

The question extends beyond problems of metropolitan areas. It is a question of serious national importance whether the state courts can repeal statutes by decree, destroying retroactively vested rights, which the legislative branch cannot do by *ex post facto* laws.

REASONS FOR GRANTING THE WRIT.

Two petitions for rehearing, and a motion to recall the mandate issued on the first appeal were overruled without opinions. The Court can recall its mandate. R.C.A. 1.340 (App. "E", p. 72).

In *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U. S. 673, 677-678, 74 L. Ed. 1107, 1111-1112, 50 S. Ct. 451, this Court found that the petitioner had in proceedings below, relied upon procedure the Supreme Court of Missouri had consistently approved, until expressly

overruled in the case at bar, too late for plaintiff to avail itself of the new remedy. A petition for rehearing was denied, without opinion. This Court stated:

> "We are of the opinion that the judgment of the supreme court of Missouri must be reversed, because it has denied to the plaintiff due process of law—using that term in its primary sense of an opportunity to be heard and defend its substantive right."

In *Great Northern Railway Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 77 L. Ed. 360, the Court recognized two exceptions to the rule that it is too late to first raise constitutional questions upon a petition for rehearing, the second of which is that the rule does not apply "where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a Federal right". The Court stated the case presented:

> "* * * a challenge to the constitutional validity of the ruling in this case whereby the statute is adjudged to mean one thing for some cases and another thing for others. This latter objection the petition could not make in advance of the event."

The Court below has denied petitioners constitutional rights, as defined by this Court, on five major points in issue.

(1) The Court denied the rights afforded by the pre-trial stipulation for a verdict by a jury, contrary to C.R. 16 (App., page 67), and the Court's decisions

in *World Fire & Marine Insurance Co.* v. *Tapp,* 151 S. W. 2d 428, 430; *Jett* v. *Holland,* 124 S. W. 2d 1055.

(2) The Court usurped the statutory function of the jury. K.R.S. 81.110 (App., page 62).

(3) The Court did not apply its decisions, consistently made, interpreting K.R.S. 81.270 (App., page 66).

Contrary to the instant decisions are the opinions in:

Overstreet v. *City of Louisville,* 310 Ky. 1, 219 S. W. 2d 405 (1949);
Engle v. *City of Louisville,* 312 Ky. 383, 227 S. W. 2d 407 (1950);

wherein the provisions of Section 1 of the statute were held to mean that an adverse judgment barred any further attempt to annex the teritory described therein, and nullified subsequent proceedings relating to any pending annexation ordinance, for a period of two years.[1]

Section 2 of the statute, in like terms, bars and nullifies any step to annex for five years all or part of a city, after an adverse vote.

The area before trial had been legally annexed to the City of St. Matthews (R. (2), 7-8). A proposal by Louisville to annex under an alternate plan au-

[1]The opinion in the *Engle* case holds:

"We must, therefore, hold that when the judgment was entered on March 26, 1948, any further attempt to annex the territory embraced therein was stopped by operation of the statute K.R.S. 81.270 (1), and the court was without authority to enter the judgment from which this appeal is brought.

"The effect is that by virtue of the statute the judgment in the first case, namely, that entered March 26, 1948, nullified ordinance 99, and subsequent proceedings relating to it."

thorized by K.R.S. 81.300 to 81.330 (App., pages 63-64) was defeated at a general election held November 6, 1956, ten days after the appellate judgment ordering entry of judgment for annexation in the trial court (R. (2), 7).

The Court on appeal stated the trial court could only enter judgment for annexation, that it could not consider the fact that the ordinance proposing annexatin was nullified by the adverse vote.

(4) The Court denied petitioners the application, as consistently construed by the Court, of Civil Rules of Procedure relating to motions for a directed verdict, motion for judgment notwithstanding the verdict, motion for a new trial, and grounds for a new trial. In the instant action the City agreed by stipulation approved by the trial court to the instructions given. The City made a motion for a directed verdict at the conclusion of plaintiffs' testimony. The City did not specify any grounds for its motion. It did unsuccessfully attempt to have the reporter insert alleged grounds approximately a week after the trial (R. (1), 124 and 129).

The Court below has consistently held that under the Civil Rules of Procedure a motion for judgment *non obstante veredicto* will not stand, unless a motion for a directed verdict is made supported by specified grounds.

C.R. 50.01 (App., page 68):

> "A motion for a directed verdict shall state the specific grounds."

C.R. 50.02 is substantially the same as Federal Rule 50b (App., page 68).

C.R. 50.03 is original in that it is not in the Federal Rules. It permits a motion for new trial to be joined with a motion for judgment notwithstanding the verdict. The City made its motion pursuant to C.R. 50.03, which was overruled by the trial court, and sustained by the appellate court (App., page 69).

The Court below has reviewed its decisions on Kentucky Rules of Civil Procedure in *Whitesides, et al.* v. *Reed, et al.*, 306 S. W. 2d 249 (1957). The Court stated, page 250:

> "It is provided in C.R. 50.01 that 'a motion for a directed verdict shall state the specific grounds therefor.' that 'When the motion has been overruled, it is mandatory that the grounds appear in the record on appeal.' * * *"

The Court then ruled, following *Virginia-Carolina Tie & Wood Co., Inc.* v. *Dunbar*, 4 Cir., 106 F. 2d 383, 385, that where the grounds in support of a motion for a directed verdict are not in the record on appeal, that:

> "* * * for the purposes of this appeal, no motion for directed verdict was made. The motion for judgment notwithstanding the verdict, made under C.R. 50.02 and C.R. 50.03, is wholly dependent on the motion for directed verdict, and it therefore follows that, for the purposes of this appeal, such motion was never made."

The Court ruled to the same effect in *Commonwealth* v. *Ragland Potter Co.*, 305 S. W. 2d 916, 917.

In the instant case, decided in 1958, the Court denied petitioners' application of C.R. 50.01, C.R. 50.02 and C.R. 50.03 as construed *supra*.

(5) The defendant agreed to the instructions given. (C.R. 51 (App., page 70) requires a party to object to an instruction specifying the matter to which he objects and the grounds for the objection. The appellate court denied petitioners' application of this rule.

(6) C.R. 50.03(2) (App., page 69) provides that the party whose verdict has been set aside upon motion for judgment notwithstanding the verdict may serve a motion for a new trial which shall be treated by the reviewing court in the same manner as provided in Section 1.

The Court below ordered judgment for the City under Section 1, and denied petitioners any right to be heard under Section 2.

(7) The Court of Appeals may grant an appeal on motion where the matter in controversy is of the value of from $200.00 to $2,500.00. An appeal may be taken when the value is $2,500.00, or more. The value of the thing in controversy must be shown in the pleadings or judgment, K.R.S. 21.070 (App., page 66).

On the first appeal taken on notice, the value in amount was not shown.

The Court was without jurisdiction by its interpretation of K.R.S. 21.070 in *Coyle* v. *Capital Engi-*

neering Services, 314 S. W. 2d 541 (1958), and *Maslow Cooperage Corp.* v. *Hofgesang,* 316 S. W. 2d 126 (1958). Both cases were cited to the Court in the petition for rehearing.

K.R.S. 81.110(3) (App., page 62) grants annexation appeal as "in other cases".

The pleadings tendered before trial and after judgment present grounds for remonstrance that the proposing ordinance was void; the area is not contiguous to Louisville; annexation would result in double taxation for two school districts, and two sewer districts. The taxation for schools and sewers in event of annexation would present constitutional questions, all of which was plead. Petitioners have been denied a day in court on these issues, each timely presented.

The Court stated in *National Association for the Advancement of Colored People* v. *State of Alabama,* 357 U. S. (2 L. Ed. 2d) 1488, 78 S. Ct. 1163:

> "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights. Cf. Brinkerhoff-Faris Trust Co. v. Hill, 281 U. S. 673, 74 L. Ed. 1107, 50 S. Ct. 451."

CONCLUSION.

There is printed as App. "F", *infra,* page 73, a map of the City of St. Matthews, including the business area, shaded, which shows the intention of the Court to destroy by fiat a smaller city by divesting it of its business district.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

(R(1) pages 773-782)

COURT OF APPEALS OF KENTUCKY

76878

CITY OF LOUISVILLE, - - - - - - *Appellant,*

v.

EDWARD A. KRAFT, ET AL, - - - - *Appellees.*

Appeal from Jefferson Circuit Court,
Common Pleas Branch, Fourth Division,
Hon. Stephen S. Jones, Judge.

OPINION OF THE COURT BY COMMISSIONER CULLEN—REVERSING.

This appeal represents another chapter in the long history of litigation involving efforts to establish municipal jurisdiction over the large, heavily populated community known as St. Matthews, lying immediately east of the City of Louisville. The main issue in the legal war has been whether the community shall be annexed to Louisville, or shall become a separate municipality. Over the past ten years a great many battles in that war have reached this Court.

The present controversy concerns the effort of the City of Louisville to annex that part of the St. Matthews community known as the "business district." The ordinance proposing annexation was adopted in 1946. A petition of remonstrance was filed in the circuit court by a number

of freeholders in the territory, thus requiring a trial of the question of annexation. KRS 81.110. For reasons which are explained in some of our previous opinions in the St. Matthews cases, the remonstrance suit was not tried until 1955. The jury returned a verdict against annexation, and judgment was entered upon the verdict. The City of Lousiville has appealed, contending that the court erred in not sustaining its motion for a directed verdict, and its subsequent motion for judgment notwithstanding the verdict.

The territory proposed to be annexed consists of the lots abutting both sides of a street known as Lexington Road, from the point where this street, running in a northeast direction, leaves the city limits of Louisville to the point where it converges with Frankfort Avenue, running east; also included are the lots abutting on the south side of the Shelbyville Road (Frankfort Avenue extended) for a short distance east of the point of convergence with the Lexington Road, and an area of several small blocks to the south of those abuting lots. A majority of the lots abutting on the Lexington Road and the Shelbyville Road are devoted to commercial uses, and they constitute the heart of the business district of the St. Matthews community.

A few years before 1946, all of the St. Matthews area except the territory involved in the present annexation proceeding was incorporated as a sanitation district, to provide sewer facilities. The territory here involved was not included because the property owners in the territory previously had made their own sewer arrangements with the City of Louisville. In 1946, the sanitation district was attempted to be incorporated as a fourth-class city, under an Act of the 1946 General Assembly, but the Act later was held unconstitutional and the attempted incorporation therefore failed.

Thereafter the City of Louisville attempted in a number of proceedings to annex the areas embraced in the sanitation district, but for one reason or another these attempts failed. The final effort resulted in a jury verdict and judgment against annexation, which was not appealed.

While the attempts of Louisville to annex the remainder of the St. Matthews area were being made, the instant remonstrance suit, concerning the business district, lay dormant. In the meantime, an area of a few residential blocks, north of the Shelbyville Road, was incorporated as the sixth-class city of St. Matthews. After one abortive effort at annexation had failed, this little city succeeded in annexing substantially all of the original sanitation district, which surrounds on three sides the territory involved in the instant action. Later the City of St. Matthews annexed the central part of the territory involved in the action. However, if the right of Louisville to annex this territory is upheld, the Louisville annexation, having first been initiated, will prevail over the St. Matthews annexation. Pfieffer v. City of Louisville, Ky., 240 S. W. 2d 560; City of Lincolnshire v. Highbaugh Realty Company, Ky., 278 S. W. 2d 636.

There is no suggestion in this case that the territory is not urban in nature, or is not adaptable to municipal use. The controversy revolves around the question of whether the municipal services and regulations which the territory clearly needs shall be supplied by the City of Louisville or by a separate St. Matthews municipality.

The governing statute is KRS 81.110, which provides that if less than 75 percent of the freeholders in the territory proposed to be annexed have remonstrated, the issues to be tried in court are whether the adding of the territory will be "for the interest of the city," and will "cause no manifest injury to the persons owning real es-

tate in the territory sought to be annexed." (The number of remonstrating freeholders here is less than 75 percent.)

In approaching our discussion of the issues in this case, we think it is essential that careful consideration be given to the limitations that exist upon the functions of the court and jury in annexation cases. Of first consideration is the fact that the creation of municipalities, and the increase or reduction of their boundaries, are matters of legislative function. The political and economic advisability of annexation, and the *policy* questions involved in the problem of municipal expansion, are to be determined solely by the legislative branch of government. It is encumbent upon the legislature to prescribe the facts and conditions under which annexation may take place. The only function of the courts is to find whether the prescribed facts and conditions exist. Constitutionally, the legislature cannot delegate to the courts its policy functions in this field, or leave to the courts to determine, as a matter of discretion or judgment, whether annexation should take place. 37 Am. Jur., Municipal Corporation, sec. 25, pp. 641, 642; Masonic Widows and Orphans Home v. City of Louisville, Ky., 217 S. W. 2d 815; Chesapeake & O. Ry. Co. v. City of Silver Grove, Ky., 249 S. W. 2d 520; Engle v. Miller, 303 Ky. 731, 199 S. W. 2d 123; Lewis v. Town of Brandenburg, 105 Ky. 14, 47 S. W. 862; White v. City of Glasgow, 148 Ky. 13, 146 S. W. 19; Board of Trustees of Elkton v. Gill, 94 Ky. 138, 21 S. W. 579; Lenox Land Co. v. City of Oakdale, 137 Ky. 484, 125 S. W. 1089; Carrithers v. City of Shelbyville, 126 Ky. 769, 104 S. W. 744; Cheaney v. Hooser, 9 B. Mon. 330; Jernigan v. City of Madisonville, 102 Ky. 313, 43 S. W. 448.

We find ourselves confronted with a statute in which the legislature has employed extremely broad language in attempting to prescribe the facts to be determined by the court and jury. The provision that the court and jury

shall determine what is "for the interest of the city" appears on its face to be a blanket invitation for the judicial branch of government to consider all the economic, political and social aspects of municipal expansion. Although somewhat more narrow, the issue of "manifest injury" to the property owners likewise seems to offer a broad scope of policy determination.

The fact that the legislature seemingly has delegated a broad range of discretion to the courts in determining annexation questions cannot be used by the courts as a justification for exercising such a discretion, because, as hereinbefore pointed out, the legislature has no power to make such a delegation. The courts must limit themselves to the fact-finding function, doing the best they can to draw some line between fact and policy.

In Masonic Widows and Orphans Home v. City of Louisville, Ky., 217 S. W. 2d 815, we endeavored to place a construction upon the statutory terms that would render some assistance in defining the scope of the fact determination to be made in annexation cases. We defined "to the interest of the city" as meaning that the annexation should contribute to the prosperity of and be generally advantageous to the city. We construed "manifest injury" to mean the clear and obvious imposition of material or substantial burdens upon the property owners.

The definitions employed in the Masonic Home case still leave the scope of the court functions pretty loosely defined. Perhaps the key can be found to lie in the words "clear and obvious." If the courts confine the fact-finding function to such things as are clear and obvious, some hope may exist of steering clear of the policy field.

As hereinbefore stated, we are faced with a question of annexation of territory that is urban in nature, and adaptable for municipal uses. We must consider what circumstances might cause the annexation of such a ter-

ritory to be contrary to the interests of the city, or to manifestly injure the property owners in the territory.

Within the realm of clear and obvious facts, it is difficult to conceive of any situation in which the annexation of urban territory to a city could be contrary to the interests of the city, except where the annexation would constitute an overextension of the *capacities* of the city to function as a sound going concern. One illustration of this may be found in Hardin v. City of St. Matthews, Ky., 240 S. W. 2d 554, where the infant City of St. Matthews, consisting of some three residential blocks, attempted on the very day of its incorporation to annex territory containing 35 times the area of the city. We pointed out that in order to justify annexation of territory a city must have had some substantial period of existence, and must have functioned as a city for a sufficient period of time to enable a rational projection of its future needs and prospects to be made.

Another illustration of overextension may be found in Gilley v. City of Russell, 213 Ky. 798, 280 S. W. 101, where a city consisting of 250 acres, which was in debt and had no immediate prospects of extensive growth, and did not have the facilities to supply city services to any added territory, attempted to annex 1,800 acres of surrounding territory. Another similar situation existed in Town of Latonia v. Hopkins, 104 Ky. 419, 47 S. W. 248, where a city of 275 population attempted to annex an area of 1,050 acres having a population of 1,500 to 2,000.

In the case before us, there is no suggestion that Louisville is not a prospering, growing city with long experience of growth, or that its capacities will be overextended by annexation of the small area here in question. The only possibility of detriment to the interests of the city arises from the fact that the city will be required to establish a fire station and fire fighting facilities in or near the an-

nexed territory, at a cost which will exceed the immediately available tax revenues from the annexed territory. However, the city showed that by reason of other annexations in the vicinity, a new fire station must be constructed in the vicinity in any event, regardless of whether the St. Matthews business district is annexed, and that only a portion of the cost of the new station would be allocable to the St. Matthews district, if annexed.

There was some effort by the remonstrants to show that the cost of furnishing regular city services to the annexed area would exceed the revenue from tax sources, but the evidence for the city was conclusive that this would not be so.

We are of the opinion that there was no evidence upon which to base a finding that the annexation would be contrary to the interests of the City of Louisville.

As concerns the question of manifest injury to the property owners in the annexed area, we apply the test of whether there will be a "clear and obvious imposition of material and substantial burdens." Masonic Widows and Orphans Home v. City of Louisville, 309 Ky. 532, 217 S. W. 2d 815. Again, we bear in mind that the property in question is urban in nature and adaptable to municipal uses, and we undertake to envisage at the outset what could constitute a burden upon property of such a nature.

Considering that the word "burden" contemplates something that is grievous, wearisome or oppressive (Webster's New International Dictionary), we think in terms of an obligation that creates a feeling of oppression or heavy burden because of the absence of compensating benefits. In other words, an obligation becomes a burden only when the benefits to be derived (often intangible) are disproportionately low in comparison to the load.

In many of our annexation cases it has been stated that the mere imposition of city taxes upon the annexed terri-

tory is not manifest injury within the meaning of the statute. Masonic Widows and Orphans Home v. City of Louisville, 309 Ky. 532, 217 S. W. 2d 815; City of Louisville v. Sullivan, 302 Ky. 86, 193 S. W. 2d 1017; Adkins v. City of Pineville, Ky., 271 S. W. 2d 625; City of Georgetown v. Pullen, 187 Ky. 697, 220 S. W. 733; City of Ludlow v. Ludlow, 186 Ky. 246, 216 S. W. 596. However, implicit in this statement is the thought that compensating benefits of some degree or nature will be received by the annexed territory.

There is no question in the case before us but that the annexed territory, being urban in nature, will receive benefits in the form of city services from the City of Louisville. The real question arises from the fact that the territory is now receiving what its residents consider to be adequate municipal services, at a lower cost, from the City of St. Matthews and from a volunteer fire department. The contention is, that the property owners in the annexed territory will receive no compensating benefits from the taxes they will be required to pay the City of Louisville because they already are receiving adequate services at a lower cost; therefore, it is argued, they will suffer manifest injury from the proposed annexation.

In Board of Trustees of Elkton v. Gill, 94 Ky. 138, 21 S. W. 579, this Court said that the question of whether the benefits of municipal government constitute *adequate* compensation for taxation is not for the courts to decide, being a matter exclusively for legislative decision. Therefore, it would seem that the question of *comparing* benefits and taxes, as between those of the City of Louisville and those of the City of St. Matthews, likewise is not for the courts, at least where there is no clear and obvious disproportion.

The evidence for the protestants, as concerns alleged injuries that would result from the annexation, was ad-

dressed ultimately towards the proposition that Louisville services would cost more than St. Matthews services. It is true there was evidence that property values in the business area would depreciate as a result of annexation, but the reason assigned for this depreciation in value was the increase in taxes. Likewise there was evidence that businesses on the south side of the Shelbyville Road would suffer a competitive disadvantage to those on the north side, but again the reason for this was the fact that those on the south side would be subjected to the Louisville payroll and gross receipts tax. There were some expressions of opinion as to *confusion* that would result from conflicting municipal regulations, but this appears to be no more than would exist along the boundaries of any growing city.

The evidence for the City of Louisville was quite convincing that the services of that city would be better than those of the City of St. Matthews. We thus find ourselves in the position of being asked to determine whether the services will be *enough* better so that the increased taxes required to be paid to Louisville cannot be considered as causing manifest injury to the property owners in the annexed area.

As previously indicated in this opinion, we think it is not a proper function of the courts, in annexation cases, to make fine comparisons of benefits and burdens. The courts are authorized to interpose only where there will be the clear and obvious imposition of material and substantial burdens. We can find no basis in the record before us for a finding that annexation of the territory in question will impose such uncompensated burdens upon the property owners as to be grievous, wearisome or oppressive. Accordingly, it is our opinion that the trial court should have directed a verdict in favor of annexation.

All parties to the appeal join in asking this Court to express an opinion, by way of dicta, on two collateral points

which are not directly raised on this appeal. One has to do with the affect annexation may have upon liability of the Louisville Sinking Fund for bonded indebtedness of the Louisville Independent School District. The other concerns the necessity of publishing, in the compiled general ordinances of Louisville, ordinances proposing annexation of territory. Admittedly, any expression of opinion on these two questions would constitute dicta. Particularly with respect to the school bond question, we would be endeavoring to pass upon the rights of a number of directly interested parties who are not represented on this appeal. We believe it would not serve the ends of justice to express an opinion on these points. However, on the school bond question, we call attention to Board of Education of Louisville v. City of Louisville, Ky., 258 S. W. 2d 707, which is not mentioned in briefs.

The judgment is reversed, with directions to sustain the motion of the City of Louisville for judgment notwithstanding the verdict, and to enter judgment accordingly.

Judge Moremen not sitting.

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HERMAN E. FRICK, Louisville, Ky.
HENRI L. MANGEOT, Louisville, Ky.

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APPENDIX "B"

(R(1) page 783)

COURT OF APPEALS OF KENTUCKY

76878

City of Louisville, - - - - - - - Appellant,

v.

Edward A. Kraft, Et Al., - - - - Appellees.

APPELLEES' PETITION FOR REHEARING.

This Court has directed the lower court to enter judgment approving annexation of a large sector of the St. Matthews business district by Louisville.

The question presented by this petition is whether this Court intended to set aside a pre-trial stipulation.

The opinion does not indicate that the pre-trial stipulation was considered. If a court approved pre-trial stipulation is binding then this petition should be sustained.

The City agreed in advance of trial that the jury would be given the instructions that the lower court gave. The agreement by the City was part of a bargain made with plaintiffs and the trial judge.

The case had been pending nine years. There was no way by which a jury could determine whether over 75 percent of the residents of St. Matthews had remonstrated, that the trial court would grant time to present, in accordance with the demands of the City. The City insisted that each remonstrant must appear in court and establish his qualifications as a resident freeholder, or freeholder, to be counted as a remonstrant.

The petition (T. R., p. 3) alleged there were 185 resident freeholders and 125 non-resident freeholders; that 165 resident freeholders and 79 non-resident freeholders had signed the original petition, or a total of 254 signatories.

Later (T. R., pp. 17 and 33) thirty-two additional freeholders filed their remonstrances, making a total of 286; 92 percent of the 310 resident and non-resident freeholders in the area.

The case was assigned for trial on:

1. July 10, 1953 (T. R., pp. 40-41).
2. October 18, 1954 (T. R., pp. 50-51), and
3. February 28, 1955 (T. R., pp. 60-61).

There were hearings in the nature of pre-trial conferences on:

1. April 7, 1954 (T. R., p. 47).
2. April 9, 1954 (T. R., pp. 48-49).
3. April 28, 1954 (T. R., pp. 50-51).
4. September 17, 1954 (T. R., pp. 51-53).
5. October 11, 1954 (T. R., p. 56), and
6. December 14, 1954 (T. R., pp. 56-58).

In order to test the denial of the City that over 92 percent had remonstrated, the plaintiffs filed a "Request For Admissions' on September 24, 1954 (T. R., p. 53), demanding that the City admit that the remonstrants constituted more than 75 percent of the freeholders of the area. The City, in accordance with the Civil Rules, was given until October 15, 1954, to answer.

On September 28, 1954, the City filed objections to the request, and admitted in the objections that its denial was not based on facts within the knowledge of its employees; and that under Kentucky Revised Statutes 81.110 the 75 percent determination was:

"A finding which by statute, is wholly within the province of the jury."

Kentucky Revised Statutes 81.110 is the same section which prescribes that the jury—not judges—shall decide the issue.

The objections of the City were heard on October 1, 1954 (T. R., p. 56).

At that hearing the plaintiffs proposed a stipulation. No ruling was made on the City's objections to the Request For Admissions.

The stipulation agreed upon, was written by the City, signed by attorneys for both sides, filed on December 14, 1954, and signed by the Judge on December 15, 1954. The case then was assigned to February 28, 1955 (T. R., pp. 56-58).

The stipulation provides:

"By agreement between the attorney for the plaintiffs and the attorneys for the defendant in the above styled action, it is hereby stipulated as follows:

I.

"The attorney for the plaintiff, Wilbur Fields, represents a substantial number of the freeholders in the area proposed to be annexed to the Ciy of Louisville by Ordinance No. 51, Series 1946.

II.

"It is stipulated that the plaintiffs, on the trial of this case, shall have the burden of proof on the whole case and that the Court shall instruct the jury with the appropriate instruction as provided by KRS 81.110 (2) when less than 75% of the freeholders of the territory to be annexed have remonstrated. Instructions to be given by the Court shall be as follows:"

Then followed the instructions which were originally and finally drafted by the City, and which had been approved by this Court in prior cases, and with which this Court does

not now find fault. A vital part of the agreement was that the case would be tried and decided by a jury, pursuant to those instructions. The Court's opinion nullifies that part of the agreement.

It has been the thought of each of the Circuit Judges, with one exception, who have tried annexation cases here, that the provision of Kentucky Revised Statutes 81.110 (2), "If the jury finds" means that the jury was designated by law to weigh the facts and decide the issue, as defined by statute.

Kentucky Revised Statute 81.110 (3) requires a local jury. It provides:

"There shall be no change of venue from the county." That clause reflects that the law recognizes annexation as a matter for decision by local people. The trial judges have been sensitive to the inherent right of people to determine by whom they shall be governed.

The most recently enacted legislation on the subject recognized that fundamental.

> "All power is inherent in the people, and all free governments on their authority and instituted for their peace, safety, happiness and the protection of property." Kentucky Constitution, Section 4.

When the bargain, that made a trial possible, was made, both sides had their reasons for wanting to get the case off of the docket.

Both sides knew the jury would be residents of Louisville.

Both sides knew about the Masonic Widows & Orphans Home opinion, and the thinking of this Court as reflected in that opinion.

In short, both sides knew what they were doing when they agreed.

Two attorneys signed for the City: S. M. Russell, City Attorney, and Herman E. Frick, Assistant City Attorney.

1. Was the Stipulation Binding?
2. If Not Binding, Then Under What Terms Can It Be Set Aside.

Civil Rule 16 provides for the making of pre-trial stipulation; and that it can only be "modified at or before the trial to prevent manifest injustice."

Judge Clay states in "Kentucky Civil Rules" (page 201):

> "The pre-trial order is most important because it controls the subsequent course of the action unless modified at or before the trial to prevent manifest injustice." . . .
>
> "The parties are bound by the pre-trial order,"

Every attorney knows that if trial agreements are not kept, the practice of law will become a series of revolting experiences.

The trial attorney for the City was aware of the agreement. That, perhaps, was the reason he did not state his grounds for a motion for a peremptory instruction until his attempt eight days after the trial, ex parte.

If this Court decides that the City should have not made the stipulation, then appellees insist that as a matter of principle and law that they be placed in status quo.

Appellees stand ready for trial with the City, if the rules be made before trial, and be followed during trial.

Appellees petition the Court to withdraw the opinion and affirm the judgment.

Respectfully submitted,

Wilbur Fields,
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Louisville 2, Kentucky,
Attorneys for Appellees.

Nov. 20, 1956.

APPENDIX "C"

(R(2) pages 74-75)

COURT OF APPEALS OF KENTUCKY

77841

Edward A. Kraft, Et Al., - - - - Appellants,

v.

City of Louisville, Kentucky, - - - - Appellee.

Appeal from the Jefferson Circuit Court,
Common Pleas Branch, Fourth Division,
Honorable Stephen S. Jones, Judge.

OPINION OF THE COURT BY COMMISSIONER WADDILL—AFFIRMING.

On the former appeal of this case the judgment was reversed with directions to enter a judgment authorizing the City of Louisville to proceed with the annexation of certain territory known as the "business district" of the community of St. Matthews. See, City of Louisville v. Kraft, Ky., 297 S. W. 2d 39.

After the petition for rehearing was overruled, the parties contesting the annexation, hereinafter referred to as Remonstrants, tendered to the trial court an amendment to their complaint. The averments of this pleading sought to invalidate the annexation proceedings on various grounds.

Remonstrants also tendered another pleading, designated as an "Amended Substituted Complaint", which contained allegations that had been stricken from the original complaint by the trial court on the former trial of the case. Objections to the filings of these pleadings were sustained. Subsequently, the trial court entered judgment authorizing the annexation of the subject territory as directed by the opinion and mandate of this Court.

On this appeal Remonstrants urge that they were entitled to amend their pleadings and raise further issues concerning the validity of the proposed annexation. They insist that the trial court erred in sustaining objections to the filing of their pleadings and in overruling their motion for a new trial.

These contentions are without merit because on the former appeal of this case the judgment was reversed with directions to enter a judgment authorizing the City of Louisville to annex the subject territory. City of Louisville v. Kraft, Ky., 297 S. W. 2d 39. Our Rules of Civil Procedure authorize this procedure. CR 50.02; see, Clay, CR 50.02, Author's Comment No. 5; Coca-Cola Bottling Works of Lexington v. Bingham, Ky., 277 S. W. 2d 468. Hence, there was nothing else for the trial court to do but to enter that judgment. Remonstrants could not amend their pleadings at that stage of the proceeding as the case was terminated except for the entry of judgment. There was therefore no proceeding pending in which further procedural steps, of the nature asserted by Remonstrants, could be taken. The Remonstrants could challenge only the failure of the trial court to enter judgment in conformity with the opinion and mandate of this Court. Noel's Adm'x. v. Black's Adm'r., 244 Ky. 655, 51 S. W. 2d 955; Davis v. Davis, 182 Ky. 805, 208 S. W. 6. Inasmuch as the judgment is not subject to this complaint, there is no ground for reversal.

Judgment affirmed.

Moremen, C. J., not sitting.

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Attorneys for Appellee:

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APPENDIX "D"

(R(2) 78-104)
77841

COURT OF APPEALS OF KENTUCKY
No. S-60-57.

Edward A. Kraft, Et Al., - - - - - Appellants,

v.

City of Louisville, - - - - - - - - Appellee.

APPELLANTS' PETITION FOR REHEARING.

This petition is filed to present:

(1) A federal question under the Fourteenth Amendment of the United States Constitution, and

(2) For a reconsideration of the case by this Court pursuant to R.C.A. 1.350, on the grounds stated in that rule:

(a) Justice demands it.

(b) The Court has overlooked material facts in the record, and controlling statutes.

(c) The Court has misconceived the issues presented on appeal, and the law applicable thereto

THE OPINION STATES THAT A MANDATE IS FINAL; THAT THE TRIAL COURT CANNOT CONSIDER ANY NEW FACT IN AVOIDANCE, NOR FACTS TIMELY PRESENTED BUT NOT ADJUDICATED.

The opinion states:

"The Remonstrants could challenge only the failure of the trial court to enter judgment in conformity with

the opinion and mandate of this Court. Noel's Adm'x. v. Black's Adm'r., 244 Ky. 655, 41 S. W. 2d 955; Davis v. Davis, 182 Ky. 805, 208 S. W. 6."

By that ruling the Court has denied Kraft, et al., equal protection of *Civil Rule* 50.03. The mandate was issued pursuant to the first section of said rule. The opinion denies Kraft, et al., the right granted by the second section of the rule to move for a new trial with the right of appeal.

The Court did not consider defenses to annexation which were timely presented in the Circuit Court.

1. That the area proposed to be annexed is not contiguous to Louisville;

2. That an adverse judgment barred annexation of the area that might be considered contiguous to Louisville;

3. That after the opinion of this Court was entered, the voters of the area rejected an annexation proposal of Louisville, which barred any further *step* by Louisville to annex for five years.

4. The question of the right to Louisville to use general property and license taxes to be collected from appellants to pay Louisville School District Bonds in excess of $18,000,000.00, which schools are in an independent district located outside the area involved.

5. The right of Louisville to use general property taxes, and license taxes to be collected from the freeholders and residents of the area annexed in payment of more than $10,000,000.00 in old Sewer Bonds of the City of Louisville for sewers located in the Metropolitan Sewer District, and pay on the bonds of their own sewers located in Sanitation District No. 1.

In contrast to the ruling in the opinion in this case, the Court's contention is directed to its ruling of May 26, 1950 (Court of Appeals File No. 72414).

This Court decided the case of *Engle* v. *City of Louisville*, 312 Ky. 383, 227 S. W. 2d 407 (a St. Matthews case), on January 20, 1950 for Engle. A petition for rehearing was overruled March 10, 1950. Thereafter, the mandate was filed in Judge Field's Court, and a judgment tendered in conformity with the opinion. Judge Field refused to enter the judgment, and dismissed the petition of Engle, et al.

A motion for a rule was then filed against Judge Field, in this Court (Court of Appeals File No. 72414), to order him to obey the mandate, supported by an affidavit.

On May 26, 1950, this Court entered the following order:

> "The Court being sufficiently advised, the motion of appellants for a Rule against Judge William H. Field, Judge, of Jefferson Circuit Court, is overruled."

In the present case the Court cites the case of *Noel's Admx.* v. *Black' sAdmr.*, 244 Ky. 655, 51 S. W. 2d 955, as authority for the rule stated in the opinion.

Engle, et al., quoted and relied upon that opinion in their brief (p. 4), in support of the motion for a rule against Judge Field.

In 1950 the Court rejected the Noel opinion as authority for the point. It now cites that opinion as authority in point.

The Noel and Black opinion are authorities, in point, in Equity appeals, where all the facts are presented, and considered, by the appellate court. The Noel opinion limits its discussion to equity suits. The pertinent part reads:

> "It is the inherent power of an appellate court in equity suits to decide a terminate case by directing a specific judgment upon a reversal of the Chancellor's decree. Preece v. Woolford, 200 Ky. 604, 255 S. W. 285. When the Court exercises that power, it is conclusive and final, binding alike on the trial court and

itself. In this case there was an adjudication on the merits and a particular judgment having the effect of concluding the issues directed. Hence, in the absence of some agreement or settlement, there was nothing else for the trial court to do but enter the judgment. Neither party had a right to reopen the record and have a retrial when that stage in the proceedings had been reached. *Each had had his day in court.*"

The case of *Davis* v. *Davis*, 182 Ky. 805, 208 S. W. 6, cited in the opinion, as authority for the finality of a mandate, was a second appeal in a divorce action. The Court held the appellant could not *relitigate* the propriety of the judgment directed to be entered.

Appellants concur, without reservation, with both opinions as applied to the facts. There must be an end to issues litigated and decided in fairness to all parties. The Courts have and exercise the inherent power to enjoin continued attempts to relitigate.

This petition is dedicated to the constitutional precept that the Courts will hear a litigant, at least once, on issues timely presented. No more is asked. No more has ever been asked in this litigation.

The appellants have not had their day in Court on any of the issues presented on this appeal.

This case stands as a particular exception to the rule that the right to be heard is a constitutional right.

The mandate issued January 25, 1957 should be recalled in fairness to appellants. A motion has been filed to recall it. A separate brief in support of the motion has been filed.

The present opinion holds that a mandate ordering entry of a specified judgment, closes the door of the Court, to any matter not adjudicated, whether timely presented in the trial court, or whether it is a new defense that came into being, after decision on the first appeal.

The Civil Rule on which the Court appears to rely does not sustain the opinion; the opinion is contrary to Sec. (2) of the Rule.

The second section of *Civil Rule* 50.03 provides:

> "The party whose verdict has been set aside upon motion for judgment notwithstanding the verdict, may, not later than ten days after notice of the order, serve a motion for a new trial, which shall be conditionally granted or denied and which shall be treated by the reviewing court in the same manner as provided in Section (1)."

Civil Rule 59.01 provides that new trials may be granted among other reasons to offer:

> "(7) Newly discovered evidence, material to the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial; * * *"

Civil Rule 60.02 provides:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for a number of reasons, including:
>
> "(1) Newly discovered evidence;
>
> "(2) The judgment is void;
>
> "(3) Any other reasons of extraordinary nature justifying relief from the operation of the judgment."

In this case the opinion denies to the appellants the protection afforded by *Civil Rule* 50.03 (2).

Pursuant to the mandate of this Court, the trial court on March 10, 1957 sustained the motion of the City for a judgment notwithstanding the verdict (T. R., p. 16). The order reads:

> "It is ordered that the motion of the defendant, City of Louisville, for judgment notwithstanding the

verdict filed on March 11, 1955, be and is hereby sustained."

The appellants then filed a motion, under the same section of the Civil Rules, that authorize a judgment notwithstanding the verdict (Supp. T. R., pp. 22-24), for a new trial.

This Court in the present opinion states that the trial court could do but one thing; that is, enter a judgment against the appellants. The question is: Did this Court overlook Civil Rule 50.03 (2). If the Court did not overlook that section at the time the opinion was written, then the Court is urged to extend its opinion and state why the rights afforded by that section are not available to Kraft, et al.

The pleadings, on which the opinion denies Kraft, et al., a day in court, involved factual issues, constitutional questions, and statutory provisions that bar Louisville from taking any further step towards annexing the territory in question. Some of the issues involved are of such importance that this Court has heretofore, in other actions, reversed the lower court for failing to enforce the rights of the litigants as set forth in such pleadings.

Under the terms of the opinion, if a man were convicted of murder, and condemned to die, and the conviction upheld on appeal, he could not escape the death penalty, with absolute proof of his innocence, discovered after the mandate was issued.

The appellants complied with the provisions of *Civil Rule* 60.02, supra, a fact misconceived by the opinion. The opinion states (page 1):

> "After the petition for rehearing was overruled, the parties contesting the annexation, hereinafter referred to as Remonstrants, tendered to the trial court an amendment to their complaint. The averments of this pleading sought to invalidate the annexation pro-

ceedings on various grounds. Remonstrants also tendered another pleading, designated as an 'Amended Substituted Complaint', which contained allegations that had been stricken from the original complaint by the trial court on the former trial of the case. Objections to the filings of these pleadings were sustained. Subsequently, the trial court entered judgment authorizing the annexation of the subject territory as directed by the opinion and mandate of this Court."

The appellants did what the opinion states. From there the opinion quickly concludes that the trial court was under mandate to enter judgment. Technically that is correct. But the Court overlooked, or misconceived, the steps taken by appellant after judgment was entered.

The judgment was entered on March 8, 1957 (Supp. T. R., p. 21).

On the same date (T. R., p. 22), Kraft, et al., filed a motion and grounds for new trial, setting forth as grounds the errors of law made in the entry of the judgment, as set forth, supra, herein.

On March 8, 1957 the Court overruled the Kraft motion to set aside orders striking Kraft pleadings, and to file a supplemental complaint, and on March 11, 1958 the Court overruled the Kraft motion to set aside the judgment entered March 8, 1957 and grant a new trial (Supp. Tr. of R., p. 25).

Kraft appealed from the order of March 11, 1957 (Supp. Tr., p. 28).

The opinion denies the right of appeal granted by statute.

The second appeal involves the question of unconstitutional collection and expenditure of general property and license taxes from appellants to be used in payment of City of Louisville Bonds in excess of $28,000,000.00 (T. R., pp. 10-11).

The second appeal also involves the constitutional question of double taxation, and taxation for governmental services, not available to appellants.

The second appeal, therefore, was taken pursuant to *Kentucky Revised Statutes* 21.060, as distinguished from the first appeal, wherein there was the single issue as defined in Kentucky Revised Statutes 81.100(2), where the value of the amount or thing in controversy was not shown to be $2,500.00, or more. That appeal having been prosecuted on notice was void, and this Court was without jurisdiction. The mandate of the first appeal should be recalled, and the appeal dismissed. The brief on the motion to recall and dismiss is included as an appendix to this petition, as a part hereof.

The questions involved on the second appeal were each timely presented, within the time limits set by *Civil Rule* 50.03(2), and (3).

This Court no longer adheres to the law of the case rule, where it concludes it has been in error, especially where no rights have accrued or become vested, and no substantial change has been made in the status of the parties by reason of the former decision.

The annexation is status quo as of the date the mandate was issued. The City did pass the second ordinance, but it is under injunction to stay out, pending the companion appeal of City of Louisville v. City of St. Matthews.

In *Union Light, Heat and Power Co. v. Blackwell's Admr.*, 291 S. W. 2d 539, this Court declared its new position on the question as follows:

> "Notwithstanding the firmness of this rule in general (the law of the case), a number of courts have maintained and held that the rule is not inflexible but is subject to exception, although the exception must be rare and the former decision must appear to be clearly and palpably erroneous. In such case it is deemed to be

the duty of the court to admit its error rather than to sanction an unjust result and 'deny to litigants or ourselves the right and duty of correcting an error merely because of what we may be later convinced was merely our ipse dixit in a prior ruling in the same case.'

• • • • • • • • •

"A number of other courts have reached the same conclusion in recognizing that the administration of justice requires some flexibility in the rule and that an appellate court not only has power to reconsider a former decision but should depart from it in unusual circumstances. A long list of cases are cited in support of the text to that effect in 5 C.J.S., Appeal and and Error, Paragraphs 1824, 1825. Many conditions held to have justified qualification and departure from the strict application of the rule are catalogued in Annotations, 1 A.L.R. 1270 and 67 A.L.R. 1390. In Alabama a statute requires the appellant court to consider anew any question previously decided without regard for its former opinion. See Wilkey v. State, ex rel., Smith, 244 Ala. 568, 14 So. 2d 536, 151 A.L.R. 765. All of these cases reflect an accelerating trend to make an exception to the general rule where it clearly appears that the result of the error to be cured far outweighs any harm that may be done in the particular case, especially where no rights have accrued or become vested and no substantial change has been made in the status of the parties by reason of the former decision.

"The court should look to the effect of its own error rather than merely acknowledge that error was committed and let it go at that. It should wipe out the effect of the mistake in the first opinion rather than perpetuate the error which would otherwise result in great wrong to the litigant and establish a bad precedent. That is essential justice.

• • • • • • • • •

"All courts of last resort occasionally exercise the natural right to change their minds and find it proper and just to overrule and thus correct their former

declarations of legal principles, notwithstanding the rule of stare decisis. That, it may be observed, is a rule similar to the law of the case rule but less forceful and subject to looser adherence. See Daniels' Adm'r v. Hoofnel, 287 Ky. 834, 155 S. W. 2d 469, for comment on the flexibility of the rule of stare decisis according to the demands of the case."

THE MANDATE ON THE FIRST APPEAL SHOULD BE RECALLED AND THE APPEAL DISMISSED, AND THE OPINION ON THE SECOND APPEAL WITHDRAWN AND THE JUDGMENT REVERSED.

The principle adopted by this Court in the Union Light case (supra), is fitted to the appellate facts of first appeal on two major grounds as reason to recall the mandate on the first appeal, dismiss that appeal, and all proceedings subsequent to that appeal.

1. This Court assumed the function of the jury in deciding the first appeal.

2. This Court overlooked the agreement and order providing for a jury decision.

And, by reason of the same principle, the opinion on the second appeal should be withdrawn because it closes the door of the Court, to the appellants on issues properly and timely presented, and ignores *Civil Rule* 50.03 (2).

The writer has reviewed all decisions of this Court, as listed in Shepherds Citations, from 1893, to date, on cases involving Kentucky Revised Statutes 81.110 in which the City of Louisville was a party.

Until the cases of *Masonic Widows and Orphans Home* v. *City of Louisville*, 217 S. W. 2d 815, and *City of Louisville* v. *Sullivan*, 193 S. W. 2d 1017, this Court never indicated that the Courts were vested, in first class city annexation suits, with the power to apply judicial consideration of the ultimate factors that enter into the issues.

Kentucky Revised Statute 81.110 does not vest the Court with such supervisory power. That section states:

> "The case shall be tried according to the practice prescribed for the trial of jury cases."

and the clause, "If the jury finds . . ." is used twice, plus a third jury reference, "unless the jury finds". The City, whenever the jury function provisions are applicable to its interests, adamantly relies on them.

This case was in a bog over the 75% remonstrant provision. The City refused to agree that the issue be decided other than by jury. The Court would not give time to such a proceeding. The remonstrants served the City with a Request for Admission, that more than 75% had remonstrated (First Appeal, T. R., pp. 53-54). The City objected to the Request (First Appeal, T. R., pp. 54-55). The second ground in the objection reads:

> "2. The request for admission requires the City to make a finding of a conclusion of fact: namely, whether or not more than 75% of the resident freeholders of the area proposed to be annexed remonstrated. A finding which by statute, is wholly within the province of the jury (K.R.S. 81.110)."

It was then that the agreement was made whereby appellants assumed the burden of proof, and the instructions to be given to the jury approved.

The City, with that knowledge, convinced this Court that the issues were subject to retrial by, or supervision of, this Court.

The Court deviated from the statutory mandate, in the Masonic case.

The judicial function was carried over to jury duties in these words:

> "These are the questions ordinarily submitted to the jury. This appeal calls for the judicial considera-

tion of the ultimate factors that enter into the issues and how they are to be viewed as a matter of law."

Masonic Widows and Orphans v. City of Louisville, supra.

That phrase is of such portent that it could be used to set aside any verdict rendered, in any type of case.

The jury came into use, partly because man had learned that no man, nor group of men, have such infinite knowledge as to be competent to grapple with "ultimate factors", in the administration of justice.

How can a litigant know what his rights might be, if they are to be determined by the political or economic concepts of ultimate factors involved as the Court might visualize them.

The Constitutions guarantee the common law right of trial by jury. The thinking of the framers of the Constitutions were that the ultimate rights of the people are best served and protected by juries, deciding issues on the basis of facts in the present time.

In an overpopulated country, judicial consideration of ultimate factors might justify decimation of unfavored segments of the population, by court mandate.

The question is, does the Court mean to apply its judicial consideration to ultimate factors in deciding cases. Will there be thumbs down decisions when ultimate factors are involved?

If it was an erroneous statement of the Court's interpretation of its power, then it should be overruled.

All Louisville annexation decisions involving Kentucky Revised Statutes 81.110 since the date of the Masonic decision, have been decided by this Court on the basis of that concept.

Since the decision of the first appeal, annexation remonstrant actions have been summarily dismissed, in Jefferson County, where less than 75% have protested, on the theory

that no grounds can exist under this Court's decision. Is that not repeal of a statute by Court decree?

The Masonic opinion did not refer to the rule as stated in City of Louisville v. Brown, Ky. , 119 S. W. 1196, (an annexation case), as follows:

> "It is earnestly insisted that the Court should have instructed the jury peremptorily on the plaintiff's evidence and on all the evidence to find for the defendant; but the rule with us is if there is any evidence the question is for the jury."

That was the rule applying to jury trials. A recent statement of the rule is in *Wadkins Adm'r.* v. *Chesapeake & Ohio Ry.*, 298 S. W. 2d 7, as follows:

> "The single controlling question on a motion for a directed verdict, either at the close of the plaintiff's evidence or at the close of all the evidence, is whether or not the plaintiff has sustained the burden of proof by more than a scintilla of evidence. 'More than a scintilla' may be defined as evidence of probative value having the fitness to induce conviction in the minds of reasonable men."

The Court in that opinion progressed further along the line of thinking expressed in the Masonic case to the point of passing upon the credibility of witnesses, Justices Hogg and Stewart dissenting.

The petitioners will not venture in the field of discussion relative to abolition of the jury by judicial fiat. They do contend that first class city annexation verdicts are vested in the jury; and that to rule otherwise is withholding from appellants equal protection of the laws, as against the City.

For instance, in *Likins* v. *City of Clarkson*, 280 S. W. 2d 491 (1955), the Chancellor decided for the City, this Court stated:

"It has been frequently said in cases of annexation, as in other cases tried in equity, that this court decides the issues according to its own view of the evidence, resolving any doubt in favor of the judgment. Under the present Rules of Procedure the finding of fact of the circuit court will 'not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.' Civil Rule 52.01."

THE MANDATE ON THE FIRST APPEAL SHOULD BE RECALLED IN JUDICIAL FAIRNESS.

Supplementing the brief on motion to recall the mandate on the first appeal, appellants call this Court's attention to its ruling in *Engle* v. *City of Louisville,* 262 S. W. 2d 371 (T. R., p. 52, First Appeal). A judgment entered March 26, 1948 in the Engle case barred annexation of part of the area involved in this action. The same judgment barred annexation of the residential area of St. Matthews, *Engle* v. *City of Louisville,* 312 Ky. 383, 227 S. W. 2d 407 (T. R., p. 28, First Appeal).

This Court held in the Engle decision, 227 S. W. 2d 407, that where two annexing ordinances include parts of the same territory, that the latter amends the first. Therefore, Ordinance No. 99, Series 1947, amended Ordinance No. 51, Series 1946 (ordinance on this appeal). Although the judgment of March 26, 1948 was entered on the City's motion, it filed a motion to enter another judgment in 1953, which did not include the streets in the business area.

The trial court substituted the City's new judgment. On appeal the new judgment was affirmed on the ground that a mistake could be summarily corrected at any time, *Engle v. City of Louisville,* 262 S. W. 2d 371.

SUMMARY OF ISSUES ON WHICH KRAFT, ET AL., HAVE BEEN DENIED THE RIGHT OF APPEAL.

The issues on which the opinion denies appellate review are collected in a motion filed, after the mandate was received (Supp. T. R., pp. 6-14), and a supplemental complaint tendered (Supp. T. R., pp. 2-4). Civil Rule 50.03(2) directs that those pleas be reviewed on appeal. There appears to be no authority for denying a hearing on matters not adjudicated. See: *Appeal and Error*, 5B C.J.S. pp. 195 to 202, for complete review.

THE SUPPLEMENTAL COMPLAINT.

The supplemental complaint pleads the election held November 6, 1956 on annexation as invoking the five year bar to annexation, and that the area involved is not contiguous to Louisville.

The statutory bar has been consistently upheld by this Court. *Kentucky Revised Statute* 81.270(2). See: *Engle* v. *City of Louisville*, 312 Ky. 383, 227 S. W. 2d 407; *Overstreet* v. *City of Louisville*, 310 Ky. 1, 219 S. W. 2d 405.

There is no legal question about the requirement that the area proposed to be annexed must be contiguous. Kraft, et al., have pled that fact. It is not subject to summary action.

THE ISSUES PLED BEFORE JUDGMENT ON FIRST APPEAL.

1. (Supp. T. R., p. 6) Upon annexation by Louisville, *Kentucky Revised Statute* 162.090 requires that the bonds of Louisville Independent School now being paid out of the City Sinking Fund be paid by direct tax on the school district.

Further, the remonstrants in the alternative would be required to pay license and income taxes to the Sinking Fund for use in payment of School Bonds payable by the Sinking Fund, for Louisville schools, and pay for the schools in Jefferson County School District.

This Court in *Sanitation District No. 1* v. *City of Louisville*, 213 S. W. 2d 995, approved and adopted the constitutional principle stated in *Jones* v. *City of Memphis*, 101 Tenn. 188, 47 S. W. 133, as follows:

> "An illustrative and extreme case of arbitrary action in relation to annexation by a city is revealed in Jones v. City of Memphis, 101 Tenn. 188, 47 S. W. 138. Under constitutional power to enact special legislation, the General Assembly provided for the annexation of certain territory to the City of Memphis, but excluded such territory from the benefits of police, fire and light protection for ten years, at the same time exempting that territory from taxation for those purposes. The Act was held unconstitutional for the reason that all parts of a city are entitled to the same protection and advantages and all taxation must be uniform and equal."

This plea was not set forth as a bar to annexation. It was pled to show it would not be to the benefit of Louisville to annex, because it could not pay its school bonds with taxes paid to the Sinking Fund.

2. (Supp. T. R., p. 8) Paragraphs II and III of an amended complaint pled the decision of this Court in *Engle* v. *City of Louisville*, 312 Ky. 383, 227 S. W. 2d 407, as a bar to annexation of the streets in the Kraft ordinance.

This matter was conclusively decided on the ultimate facts in the Engle decision, supra.

3. By supplemental amendment to their amended complaint (Supp. T. R., pp. 10-11), Kraft, et al., pled unconstitutional application of taxes to the Sinking Fund in

reliance upon this Court's ruling in *Sanitation District No. 1* case, supra. That case declared unconstitutional *Kentucky Revised Statute* 220.530, which required a city upon annexation to assume liability for payment of Sanitation Sewer District Bonds.

That decision, as applied, makes the present decision unconstitutional, because it directs annexation wherein the people living in the annexed area would not be entitled to the same protection and advantages, and taxation would not be uniform and equal (supra).

The opinion quotes 2 Corby's Constitutional Limitations, page 1035, note, and Section 3 of the Constitution.

> "(10-12) Appropriate to our present consideration is the following comment of a distinguished authority, 2 Cooley's Constitutional Limitations, page 1035, note, as follows: 'The general idea of our tax system is, that those shall vote the burdens who are to pay them; and it would be intolerable that a central authority should have power, not only to tax localities, for local purposes of a public character, which they did not approve, but also, if it so pleased, to compel them to assume and discharge private claims not equitably chargeable upon them.'
>
> "Section 3 of the Constitution reads: 'No grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services.' ".

That opinion separates the people of Louisville into two classes on governmental costs.

The people of St. Matthews would be required to pay for their sewers by redemption of outstanding mortgage bonds, and for Louisville's old sewers by taxes paid to the Sinking Fund.

The opinion states that fact is of no legal consequence (p. 1002), but predicates its ruling on the erroneous assump-

tion that St. Matthews would have the right to use the city trunk line sewers without charge. A substantial part of the revenue from St. Matthews sewers is paid for the grant to connect with City trunk lines.

The Constitutional precepts stated in that opinion are applicable to the unconstitutional situations annexation would create, by reason of the rulings made in the opinion, which is now the law of the case as to the sewer question.

4. (Supp. T. R., p. 14) Kraft, et al., pled the adverse judgment of August 29, 1952, pursuant to a jury verdict, as a bar to annexation. This is a factual issue predicated upon *Engle* v. *City of Louisville*, 227 S. W. 2d 407.

CONCLUSION.

For the reasons stated, the Court is urged to recall the mandate issued January 25, 1957 on the first appeal, and dismiss that appeal. This appeal and the companion appeal of City of Louisville v. City of St. Matthews would become moot.

In the alternative, the Court is urged to withdraw the opinions in the pending appeals, and remand to the Circuit Court with directions to file the pleadings set forth in the Supplemental Transcript of the Record on this appeal, and try such issues as may be joined by the City.

Respectfully submitted,

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Attorney for Appellants.

COURT OF APPEALS OF KENTUCKY

City of Louisville, - - - - - - Appellant,

-v-

Edward A. Kraft, et al., - - - - - Appellees.

APPELLEES' BRIEF ON MOTION TO RECALL MANDATE—Issued January, 1957.

This Court ruled twice on June 20, 1958 in the cases of:

Coyle v. *Capital Engineering Service,* and
Maslow Cooperage Corp. v. *Hofgesang,*

that it does not have jurisdiction, on the facts as presented by the record in this case.

Neither the pleadings, nor the judgment fix the value or the amount in controversy, which this Court stated in the two opinions, supra, is mandatory under *Kentucky Revised Statutes* 21.070, to establish jurisdiction on appeals granted by the trial court.

In *Coyle* v. *Capital Engineering Service,* the Court stated it could not rule on a motion to remand because,

> "This Court does not have jurisdiction for the reason stated and, therefore, cannot consider the motion to remand."

That is, no valid order can be issued where the Court lacks juridsiction. The mandate ordered entry of a judgment for appellant notwithstanding the verdict of the jury. It should be recalled as a void order.

NO INHERENT RIGHT EXISTS TO APPEAL FROM ADVERSE ANNEXATION JUDGMENTS.

Annexation proceedings are statutory. The right to appeal is a statutory right.

Appeals cannot be taken from judgments on annexation proposals of Third and Fifth Class Cities, *Kentucky Revised Statutes* 81.190(4) and 81.230(3).

Appeals may be taken "as in other cases" from judgments on annexation proposals of First, Second, Fourth and Sixth Class Cities, *Kentucky Revised Statutes* 81.110(3).

Annexation trials in all classes, but First, are by the Court.

The Statutes direct trial and decision by a jury on First Class City annexation actions, Kentucky Revised Statutes 81.110(2). The Court is not given the power to decide the issue, a fact this Court has been overlooking for ten years, in the St. Matthews area cases.

The words, "if the jury finds" are the only words used which vest the right of decision, Kentucky Revised Statutes 81.110. This error evolved from use of opinion on appeals from annexation judgments of the other classes of cities tried as equity cases.

The jury is constituted as a special body to make the finding.

The right of appeal, therefore, is not an inherent right, and exists only as granted, and within the jurisdictional requirements of Kentucky Revised Statutes 21.070.

THIS COURT HAS THE INHERENT RIGHT TO RECALL THE MANDATE.

R.C.A. 1.340 provides that:

> "The issuance or recall of the mandate is within the inherent discretion of the Court."

R.C.A. 1.350 states that except in extraordinary cases when justice demands it, a petition for rehearing shall be limited to a consideration of the issues argued on appeal and will be granted only when it appears that the Court has overlooked a material fact in the record, or a controlling statute or decision, or has misconceived the issue presented on appeal or the law applicable thereto.

The opinion, pursuant to which, the mandate ordered entry of judgment notwithstanding the verdict of the jury, overlooked:

(1) That the City of Louisville approved the instruction given to the jury;

(2) That the City did not object to the instructions given (see *Brumley* v. *Davidson*, 273 S. W. 2d 54; *Struelker* v. *Neiser*, 290 S. W. 2d 781);

(3) That the City stated no grounds in support of its motion for a peremptory instruction;

(4) The provisions of the Statute requiring a finding by a jury;

(5) That the case was tried by appellees on the basis of a solemn covenant made with the City, that the case would be decided by a jury on agreed instructions.

The mandate is a manifest injustice to appellees and should be recalled.

The Supreme Court of the United States recently found that it had overlooked a material fact in deciding a case, and in overruling a petition for rehearing. That Court

recalled the mandate, after the judgment had been paid. The Court stated:

> "We deem our original order erroneous and recall it in the interest of fairness."

See: *Cahill* v. *New York, New Haven & Hartford Railroad Co.* (decided May 14, 1956), 351 U. S. 898, 100 L. Ed. 790, 76 S. Ct. 180, and the petition for rehearing overruled, 350 U. S. 943, 100 L. Ed. 823, 76 S. Ct. 300.

The Supreme Court Rule on issuance of mandates, did not have the "inherent" power clause. Rule 34, Supreme Court, which was in effect, reads:

> "RULE 34. Mandates shall issue as of course after the expiration of twenty-five days from the day the judgment is entered, irrespective of the filing of a petition for rehearing, unless the time is shortened or enlarged by order of the court, or of a justice thereof when the court is not in session."

the decision, therefore recognizes the inherent power which the rule of this Court declares.

In 84 *A.L.R.*, pages 591 and 592, are listed cases from seventeen states, wherein the appellate courts recalled their mandates to correct a judgment or order which was improvidently or erroneously given, that law and justice might prevail.

We quote from some of the annotations:

> "Against an order or judgment improvidently granted, on a false suggestion, or under a mistake as to the facts of the case, an appellate court will afford relief after the adjournment of the term; and will, if necessary, recall a remittitur and stay of proceedings in the court below. This is not done, however, on the principle of resumption of jurisdiction, but on the ground that the jurisdiction of the court cannot be devested by an irregular or improvident order. Rowland v. Kreyenhagen (1864), 24 Cal. 52.

"In King v. Ruckman (1871), 22 N. J. Eq. 551, it was said: 'I have no doubt that this court has the power at any time to amend [illegible] judgment, if it is erroneous by reason of the misentry of the clerk, or by reason of any other mistake; or that such judgment may be set aside and treated as a nullity if it has been procured by fraud, or is the result of misapprehension.'

"When by mistake or inadvertence, an order, judgment, or decision is improvidently made as to the statute defining the jurisdiction of the trial court, although the mandate is transmitted to the trial court and by it recorded, the appellate court does not lose jurisdiction of the cause, and may recall the same when the court's attention is called to such mistake. St. Paul F. & M. Ins. Co. v. Peck (1914), 40 Okla. 396, 139 Pac. 117.

"In Ehrig v. Adams (1917), 67 Okla. 157, 169 Pac. 645 (reversing order on rehearing (1915) —— Okla. ——; 152 Pac. 504), it was said: 'As a general rule this court will not recall its mandate after the same has regularly issued and judgment entered thereon in the lower court, in the absence of fraud, accident, or inadvertence.

"However, it has the power, and, in a proper case, will recall the mandate, notwithstanding the term of this court at which same issued has expired. The judgment reversing this case and ordering a new trial, through inadvertence, was based upon an act of Congress which had been repealed; the case not having been fully disposed of in the lower court, the relations of the parties not having changed, and the rights of third parties not being involved, it was proper to recall the mandate and to permit the filing of a petition for rehearing."

84 *A.L.R.*, page 594:

"In Milam County v. Robertson (1877), 47 Tex. 222, it was held that the supreme court had power, even after the term at which a judgment was rendered, to recall its mandate and vacate the judgment, where

such judgment was absolutely void for want of jurisdiction, or voidable for error in fact, if such fact was unknown to the court or it can be supposed to have acted unmindfully of it. In that case, however, the court refused to recall its mandate where it appeared that the application was made after a delay of seven years."

84 *A.L.R.*, pages 594 and 595:

"Where certain parties were not before the appellate court by service of process or appearance, an appeal as to them is prematurely heard, and any judgment affecting their rights is void, and the court may, after the expiration of the term, make such corrections as are just and proper. Finnell v. Jones (1870), 7 Bush (Ky.) 859.

"In State v. Marsh (1903), 134 N.C. 184, 67 L.R.A. 179, 47 S. W. 6, it appeared that the defendant was convicted of rape. On appeal the judgment was arrested on the ground that there was no allegation in the indictment that the offense had been committed 'against the will of the prosecutrix.' This omission was due to an oversight of the clerk, it appearing that the words were in fact contained in the indictment on which the defendant was tried. It was held that the Supreme Court had power, even after the term expired, to grant a writ of certiori for the correction of the record, and reset the case for hearing on the exceptions taken at the trial."

84 *A.L.R.* 595:

"Where a decree is entered by an appellate court without jurisdiction, the court may thereafter of its own motion and without notice, set it aside. Thomas v. Robinson (1902), —— Iowa ——, 92 N. W. 70."

"The rule is stated in Franklin Bank Note Co. v. Mackey (1899), 158 N. Y. 683, 51 N. E. 178, as follows: 'There is a very general misapprehension as to the practice of the court on motions for reargument or to amend the remittitur. It is often erroneously assumed

that, after the filing of the remittitur in the court below and order entered thereon, this court is deprived of all jurisdiction in the cause. . . . It is competent for this court to determine whether it will resume jurisdiction for any purpose, and, having decided to do so, it then requests the court below to return the remittitur, so that reargument can be had, or the remittitur amended, as the case may be. It is technically true that this court must be repossessed of the remittitur before an order made in the cause is effectual, but there is no objection to the return of the remittitur following the determination of this court to resume jurisdiction. The supreme court is always reluctant to vacate its order and return the remittitur in the absence of an expression by this court that it desires such a course to be pursued.' And see People ex rel. Schurs v. Cook (1888), 111 N. Y. 688, 19 N. E. 286; Sweet v. Mowry (1893), 138 N. Y. 650, 34 N. E. 388; Re Thompkins (1898), 155 N. Y. 663, 49 N. E. 1105; Re Westerfield (1901), 61 App. Div. 413, 70 N. Y. Supp. 641."

If appellees are denied the verdict of the jury authorized by statute, and by the pre-trial agreed order, then they submit to the Court, their greivance that they have been denied equal protection of the laws guaranteed them by the Fourteenth Amendment of the United States Constitution.

Wherefore, for one, more, or all of the reasons stated, the Court is urged to sustain the motion.

Respectfully submitted,

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APPENDIX "E"

KENTUCKY REVISED STATUTES (K.R.S.) 81.100:

"*Annexation of unincorporated territory or reduction of territory by first-class city.* The boundaries of cities of the first class shall remain as established by law until changed as provided in KRS 81.100 to 81.130. Whenever a city of the first class desires to annex any unincorporated territory or reduce the boundaries of the city, the city legislative body may enact an ordinance, defining accurately the boundary of the territory proposed to be annexed or stricken off. The ordinance shall be published in at least ten issues of the daily paper published in and having the largest circulation in the city. In not less than thirty days after the enactment of the ordinance, if the publication has been made and no petition has been filed in the circuit court as provided in KRS 81.110, the city legislative body may enact another ordinance annexing to the city or striking from the city the territory described in the ordinance. Upon the enactment of this ordinance, the territory shall become part of the city, or be stricken from the city."

KENTUCKY REVISED STATUTES (K.R.S.) 81.110:

"*Protest against annexation of unincorporated territory or reduction of territory by first-class city; trial; judgment.* (1) Within thirty days after the enactment of an ordinance proposing to annex unincorporated territory to a first-class city, or to reduce its limits, one or more residents or freeholders of the territory proposed to be annexed or stricken off may file a petition in the circuit court of the county, setting forth the reasons why the territory or any part of it should not be annexed, or why the limits should not be reduced. Summons shall issue on the petition and be executed on the chief executive officer of the city, and

the answer of the city shall be filed within twenty days after service of the summons. The case shall be tried according to the practice prescribed for the trial of jury cases.

"(2) If the jury finds, upon a hearing, that less than seventy-five percent of the freeholders of the territory to be annexed or stricken off have remonstrated, and that the adding or striking off of the territory will be for the interest of the city, and will cause no manifest injury to the persons owning real estate in the territory sought to be annexed or stricken off, the annexation or reduction shall be approved and become final. If the jury finds that seventy-five percent or more of the resident freeholders of the territory sought to be annexed or stricken off have remonstrated, the annexation or reduction shall not take place, unless the jury finds from the evidence that a failure to annex or strike off will materially retard the prosperity of the city, and of the owners and inhabitants of the territory sought to be annexed or stricken off, in which case the annexation or reduction shall take place notwithstanding the remonstrance.

"(3) An appeal from the judgment may be taken as in other cases, but there shall be no change of venue from the county. Costs shall follow the judgment.

"(4) The judgment shall, when entered, be certified to the city legislative body, which may thereupon annex to or strike from the city the territory described in the judgment, and the territory shall then become, or cease to become, a part of the city."

KENTUCKY REVISED STATUTES (K.R.S.) 81.300:

"Plan for the improvement of local government in county containing city of first class may be submitted to fiscal court; action by fiscal court; election; time within which fiscal court must act. In any county containing a city of the first class, the mayor of the city of the first class

with the approval of the board of aldermen, may submit to the fiscal court a plan for the improvement of local government in the county as set out herein below. The fiscal court shall, if they approve, deliver a certified copy of the plan to the county clerk, who shall cause to be submitted to the qualified voters of the affected areas at the next general election which does not occur within less than ninety days of the submission by the mayor of the plan to the fiscal court, the question set out in KRS 81.350. In any event the fiscal court shall express its approval or disapproval of the plan within thirty days of the submission of the plan by the mayor to them."

KENTUCKY REVISED STATUTES (K.R.S.) 81.310:

"*Plan to define area and name governmental services to be rendered.* (1) Any such plan shall define the area within the county wherein density of population, land use, or other similar factors require municipal-type services for the residents thereof.

"(2) Any such plan shall name the various governmental services which will be rendered in the county in a manner different after the approval of the plan than before and it shall also specify the statutory authority for such change in service.

"(3) Any such plan may include the rendition by the county or the city of services in accordance with the provisions of KRS 79.110 through 79.180, inclusive."

KENTUCKY REVISED STATUTES (K.R.S.) 81.320:

"*Tabulation of votes.* The votes on the plan shall be tabulated in the following manner:

"(1) The total votes cast within the city of the first class shall be tabulated as a separate total.

"(2) The total votes cast in the affected area as described pursuant to KRS 81.310, but lying outside of the

city of the first class shall be tabulated as a separate total; included within this total, the votes cast in each city within this area, which has been incorporated more than twelve months prior to the submission to the qualified voters of the question on the plan, shall be tabulated as individual totals for the purposes described in subsections (2) and (3) of KRS 81.330."

KENTUCKY REVISED STATUTES (K.R.S.) 81.330:

"*When plan to take effect; exclusion of city from boundaries of new city; result; liability of city of first class.* (1) If more than half of the votes cast within the city of the first class and more than half of the votes cast in the affected area outside of the city of the first class are in favor of the plan, then it shall be effected and the boundaries of the city of the first class shall thirty days after the certification of the election be extended so as to include the area described in accordance with KRS 81.310, including any city of a lesser class within such area, except,

"(2) If in any city other than of the first class within the area affected (except cities incorporated within twelve months of the submission of the question on the plan to the voters), more than half of the votes cast are opposed to the plan, then such city shall be excluded from the new boundaries of the city of the first class. The total votes cast in any such city rejecting the plan shall be deducted from the total votes cast on the question so that the votes cast in such city shall have no effect upon the acceptance or rejection of the plan as a whole.

"(3) If the plan is approved, thereafter, neither the county government nor any of its agencies or joint agencies shall be required to render any services within a rejecting city that it does not render within a city of the first class in accordance with the plan. However, the fiscal court may determine that the rendition of any governmental service

within a rejecting city is necessary for the public health, safety or welfare in which event the rejecting city may be required to pay to the county the costs of such services rendered.

"(4) The city of the first class shall be bound for all the debts and liabilities and shall be the owner of all corporate property, franchises and rights of any city included within its boundaries extended as hereinabove provided and becoming a part thereof; thirty days after the certification of the approval of the plan by the voters any such city shall cease to exist."

KENTUCKY REVISED STATUTES (K.R.S.) 81.270:

"*Resubmission of proposal for annexation or reduction by city of any class when first proposal is denied by court or defeated by voters.*

"(1) If a judgment of the circuit court is adverse to annexation or reduction by a city of any class, no further attempt to annex or strike off the territory concerned shall be made within two years after rendition of the judgment.

"(2) If a proposal by a city of the first class to annex all or any part of a smaller city, or a proposal by a city of the second class to annex a city of the second, third or fourth class, is rejected by the voters of the city or part of city proposed to be annexed, no further steps to annex the same city or part of city shall be taken within five years from the date of rejection, nor shall the question of annexation be again submitted within that period."

KENTUCKY REVISED STATUTES (K.R.S.) 21.070:

"*Amount in controversy, how ascertained.* If a judgment does not, when construed in connection with the pleadings, certainly fix the value of the amount or thing in controversy, the court, shall, upon the request of either party, state in the judgment the actual value in controversy, and

this valuation shall be conclusive of the amount in controversy for the purposes of appeal."

CIVIL RULE (C.R.) 16:

"PRE-TRIAL PROCEDURE; FORMULATING ISSUE.

"In any action, the court may in its discretion, and the circuit court shall no motion, direct the attorneys for the parties to appear before it for a conference to consider:

"(1) The simplification of the issues;

"(2) The necessity or desirability of amendments to the pleadings;

"(3) The possibility of obtaining admissions of fact and documents which will avoid unnecessary proof;

"(4) The limitation of the number of expert witnesses;

"(5) The advisability of a preliminary reference of issues to a commissioner;

"(6) Such other matters as may aid in the disposition of the action.

"The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at or before the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to nonjury actions or extend it to all actions."

KENTUCKY CIVIL RULE (C.R.) 50.01:

"MOTION FOR A DIRECTED VERDICT WHEN MADE; EFFECT. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a wavier of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor."

KENTUCKY CIVIL RULE (C.R.) 50.02:

"MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the moving party may move, within 10 days after the reception of a verdict, to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict is not returned, such party, within 10 days after the jury has been discharged, may move for a judgment in accordance with his motion for a directed verdict. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict has been directed or may order a new trial."

KENTUCKY CIVIL RULE (C.R.) 50.03:

"JOINING MOTION FOR JUDGMENT NOTWITHSTAND VERDICT WITH MOTION FOR NEW TRIAL; EFFECT.

"(1) A motion for a new trial may be joined with the motion for judgment or a new trial may be prayed for in the alternative. If the motion for judgment is granted, the court shall rule on the motion for new trial by determining whether it should be granted if the judgment is thereafter vacated or reversed. If the motion for new trial is thus conditionally granted the court shall specify the grounds therefor, and such an order does not affect the finality of the judgment. In case the motion for new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court shall have otherwise ordered. In case the motion for new trial has been conditionally denied and the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court. An appeal to the Court of Appeals from a judgment granted on a motion for judgment notwithstanding the verdict, shall of itself, without the necessity of a cross-appeal bring up for review the ruling of the trial court on such motion for new trial.

"(2) The party whose verdict has been set aside upon motion for judgment notwithstanding the verdict may, not later than 10 days after notice of the order, serve a motion for a new trial, which shall be conditionally granted or denied and which shall be treated by the reviewing court in the same manner as provided in Section (1).

"(3) Any party who fails to make a motion for new trial as provided in Sections (1) and (2) shall be deemed to have waived the right to apply for a new trial."

KENTUCKY CIVIL RULE (C.R.) 51:

"INSTRUCTIONS TO JURY; OBJECTIONS. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may offer written requests that the court instruct the jury on the law as set forth therein; the court shall give or refuse the instructions and shall give the jury written instructions before the commencement of the argument to the jury. No party may assign as error the giving or the failure to give an instruction, unless he objects thereto before the court instructs the jury, stating specifically the matter to which he objects and the grounds of his objections. Opportunity shall be given to make his objections out of the hearing of the jury."

KENTUCKY CIVIL RULE (C.R.) 59.01:

"GROUNDS. A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes:

"(1) Irregularity in the proceedings of the court, jury or prevailing party, or an order of the court, or abuse of discretion, by which the party was prevented from having a fair trial.

"(2) Misconduct of the jury, of the prevailing party, or of his attorney.

"(3) Accident or surprise which ordinary prudence could not have guarded against.

"(4) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court.

"(5). Error in the assessment of the amount of recovery whether too large or too small.

"(6) That the verdict is not sustained by sufficient evidence, or is contrary to law.

"(7) Newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial.

"(8) Errors of law occurring at the trial and objected to by the party under the provisions of these rules."

KENTUCKY CIVIL RULE (C.R.) 60.02:

"MISTAKE; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence by which due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason of an extraordinary nature justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant constructively served as provided in Rule 4.10, or to

set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querla, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

RULES OF THE COURT OF APPEALS (R.C.A.) 1.340:

"MANDATE. *Issuance and recall.* The issuance or recall of the mandate is within the inherent discretion of the Court, but, unless otherwise ordered or unless stayed by the filing of a petition for rehearing, modification or extension, it will be issued by the Clerk as a matter of course 30 days after the opinion is delivered. For good cause the Court may order the issuance of the mandate before that time. Upon issuance of the mandate, the Clerk shall forthwith send a copy of the mandate to each attorney of record and the original to the Clerk of the Trial Court who shall immediately file it in the original record and note the filing on the proper docket."